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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1957

NO. 540

HENRY THOMAS HAILE, JR.; MELVIN THOMAS HAILE, by his next friend, Henry Thomas Haile, Jr.; CAROLYN DARLENE HAILE, by her next friend, Henry Thomas Haile, Jr.; ORA ELLEN SMITH; MRS. GERTRUDE L. HAILE; and HENRY THOMAS HAILE

Petitioners

-vs-

THE EASTERN BAND OF CHEROKEE INDIANS, a corporation

Respondents

---

**PETITION OF HENRY THOMAS HAILE, JR.; MELVIN THOMAS HAILE, by his next friend, Henry Thomas Haile, Jr.; CAROLYN DARLENE HAILE, by her next friend, Henry Thomas Haile, Jr.; ORA ELLEN SMITH; MRS. GERTRUDE L. HAILE; and HENRY THOMAS HAILE FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.**

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*To the Honorable, the Chief Justice of the United States and The Associate Justices of the Supreme Court of the United States:*

The petitioners above named respectfully pray that a writ of certiorari issue directed to the United States Court of Appeals for the Fourth Circuit to the end that the Order and Judgment of that court affirming an Order of the United States District Court for the Western District of North Carolina dismissing this

action as to the defendant, The Eastern Band of Cherokee Indians, a North Carolina corporation, may be reviewed and corrected.*

It is, therefore, shown:

## OPINIONS BELOW

The Opinion of the Court of Appeals is reported in .....F (2) ....., and copy appended hereto as Exhibit No. 1. The Opinion of the United States District Court was not reported, but copy thereof contained in the Judgment of the District Court is appended hereto as Exhibit No. 2.

## GROUNDS OF JURISDICTION

Jurisdiction is shown as follows:

The Judgment sought to be reviewed is a Judgment of the United States Court of Appeals for the Fourth Circuit, which was entered on the 13th day of July, 1957.

The jurisdiction of this Court to entertain this petition is based upon *28 U.S.C. 1254 (1).*

## THE QUESTION PRESENTED FOR REVIEW

Whether or not the Eastern Band of Cherokee Indians, a North Carolina corporation, is suable in tort, without the consent of Congress, when it appears that the political organization of the Band operates under the corporate charter.

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* Record references are to the Appendices filed by the Petitioners and the Respondents in the Court below, the Petitioners' Appendix being designated by the abbreviation "P.A.", and the Respondents' by the abbreviation "R.A."

## THE CONSTITUTIONAL PROVISIONS, STATUTES, AND TREATIES INVOLVED

CONSTITUTION OF THE UNITED STATES, ARTICLE I, SEC. 8, in part, as follows:

> "The Congress shall have power . . . To regulate commerce with Foreign Nations, and among the several States, and with the Indian Tribes;"

TREATY OF NEW ECHOTA (1853) ARTICLE XII, as follows:

> "Those individuals and families of the Cherokee nation that are averse to a removal to the Cherokee country west of the Mississippi and are desirous to become citizens of the States where they reside and such as are qualified to take care of themselves and their property shall be entitled to receive their due portion of all the personal benefits accruing under this treaty for their claims, improvements and per capita; as soon as an appropriation is made for this treaty.
>
> Such heads of Cherokee families as are desirous to reside within the States of No. Carolina, Tennessee and Alabama subject to the laws of the same; and who are qualified or calculated to become useful citizens shall be entitled, on the certificate of the commissioners to a pre-emption right to one hundred and sixty acres of land or one quarter section at the minimum Congress price; so as to include the present buildings or improvements of those who now reside there and such as do not live there at present shall be permitted to locate within two years any lands not already occupied by persons entitled to pre-emption privilege under this treaty and if two or more families live on the same quarter section

and they desire to continue their residence in these States and are qualified as above specified they shall, on receiving their pre-emption certificate be entitled to the right of pre-emption to such lands as they may select not already taken by any person entitled to them under this treaty.

It is stipulated and agreed between the United States and the Cherokee people that John Ross James Starr George Hicks John Gunter George Chambers John Ridge Elias Boudinot George Sanders John Martin William Rogers Roman Nose Situwake and John Timpson shall be a committee on the part of the Cherokees to recommend such persons for the privilege of pre-emption rights as may be deemed entitled to the same under the above articles and to select the missionaries who shall be removed with the nation; and that they be hereby fully empowered and authorized to transact all business on the part of the Indians which may arise in carrying into effect the provisions of this treaty and settling the same with the United States. If any of the persons above mentioned should decline acting or be removed by death; the vacancies shall be filled by the committee themselves.

It is also understood and agreed that the sum of one hundred thousand dollars shall be expended by the commissioners in such manner as the committee deem best for the benefit of the poorer class of Cherokee as shall remove west or have removed west and are entitled to the benefits of this treaty. The same to be delivered at the Cherokee agency west as soon after the removal of the nation as possible."

PUBLIC LAWS OF NORTH CAROLINA, 1866, Ch. 54, Sec. 1:

"That the Cherokee Indians who are now residents of the

State of North Carolina, shall have authority and permission to remain in the several counties of this State where they now reside; and shall be permitted to remain permanently therein so long as they may see proper to do so, anything in the Treaty of 1835 to the contrary notwithstanding."

ACT OF CONGRESS, July 27, 1868, 15 Stat. 228:

"July 27, 1868 — Chap. CCLIX — An Act to transfer to the Department of the Interior certain Powers and Duties now exercised by the Secretary of the Treasury in Connection with Indian Affairs.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the powers and duties devolving upon the Secretary of the Treasury, under and by virtue of the fourth section of the act entitled "An act making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with the various Indian tribes for the year ending June thirtieth, eighteen hundred and forty-nine, and for other purposes," approved July twenty-ninth, eighteen hundred and forty-eight, and the powers and duties devolving upon him under and by virtue of the laws relating to the investment of the moneys in behalf of the Cherokee Indians, from the sales of land under the treaties concluded at Pontotoc, October twentieth, eighteen hundred and thirty-two, and at Washington City, May twenty-fourth, eighteen hundred and thirty-four, as also all other supervisory and appellate powers and duties in regard to Indian affairs, which may now by law be vested in the said Secretary of the Treasury, shall from and after the passage of this act be exercised and performed by the Secretary of the Department of the Interior.

Sec. 2. And be it further enacted, That the Secretary of the Interior shall cause a new roll or census to be made of the North Carolina or Eastern Cherokees, which shall be the roll upon which payments due said Indians shall be made.

Sec. 3. And be it further enacted, That hereafter the Secretary of the Interior shall cause the commissioner of Indian affairs to take the same supervisory charge of the Eastern or North Carolina Cherokees as of other tribes of Indians. Approved, July 27, 1868."

ACT OF CONGRESS, March 3, 1871, 25 U.S.C. 71:

"No Indian Nation or Tribe within the territory of the United States shall be acknowledged or recognized as an independent Nation, Tribe or power with whom the United States may contract by treaty."

NORTH CAROLINA PRIVATE LAWS, 1889, Ch. 211, Sec. 1 and 2:

"The General Assembly of North Carolina do enact:

*Section 1.* That the North Carolina or Eastern Cherokee Indians resident and domiciled in the counties of Jackson, Swain, Graham and Cherokee, be and the same are hereby created and constituted a body politic and corporate under the name, style and title of "The Eastern Band of Cherokee Indians", with all the rights, franchises, privileges and powers incident and belonging to corporations under the laws of the State of North Carolina.

*Section 2.* That "The Eastern Band of Cherokee Indians" by that name and style, be and they are hereby authorized and empowered to sue and implead in law or in equity in

all courts of the land touching and concerning all the property of whatever nature held in common by the said North Carolina or Eastern Cherokee Indians in the said counties; and that the said "Eastern Band of Cherokee Indians", by that name and style, can and may be sued and impleaded in all the courts in the land touching and concerning the said property held as aforesaid in the said counties."

## STATEMENT OF THE CASE

This is one of fifteen cases seeking damages for injuries or deaths of forty-one persons. By stipulation (P.A., 36) and Order (P.A., 41), it was determined that this suit should be treated as a test case, and that the results on appeal here would be binding in all of the other pending cases.

The plaintiffs instituted this action on the 3rd day of January, 1956, in the United States District Court for the Western District of North Carolina, for serious personal injuries occurring on the 3rd day of July, 1955, when a swinging bridge over the Oconaluftee River on the Cherokee Indian Reservation in Swain County, North Carolina, collapsed and precipitated them onto the rocks in the stream below. The case was instituted against Osley Bird Saunooke, Bertha Saunooke, the Eastern Band of Cherokee Indians, a corporation, and the United States in its capacity as a government and also as trustee for and guardian of the Eastern Band of Cherokee Indians and the individual members thereof; however, only the Eastern Band of Cherokee Indians, a corporation, is named herein as Respondent.

The bridge had been constructed by the United States Government for the Eastern Band of Cherokee Indians, and was being utilized by the individual defendants as one means of access to their restaurant and gift shop. Numerous allegations of negligence are made against all of the defendants. Jurisdiction against the United States is predicated upon the Federal Tort Claims Act, *28 U.S.C., 1346(b)*. Jurisdiction against the individual defendants and The Eastern Band of Cherokee Indians, a North Carolina corporation, is based upon diversity of citizenship, *28 U.S.C. 1332(a)(1)*.

On May 4, 1956 (R., pg. 34) the United States in its capacity as trustee for and guardian of the Eastern Band of Chero-

kee Indians filed a motion to dismiss on the ground that it had not consented to be sued in that capacity. This motion was sustained by the District Court, and this was affirmed on appeal by the United States Court of Appeals, and this decision is not presented for review. The defendant, The Eastern Band of Cherokee Indians, a North Carolina corporation, made a Motion to Dismiss in the following words:

> "The defendant, the Eastern Band of Cherokee Indians, moves the Court to dismiss this action as to said defendant, the Eastern Band of Cherokee Indians, for the reason that the United States has not consented that this defendant, the Eastern Band of Cherokee Indians, may be sued; and, therefore, this Court lacks jurisdiction over the subject matter of this action and lacks jurisdiction over the person of this defendant, the Eastern Band of Cherokee Indians, and this Court is without jurisdiction to grant the relief sought by the Complaint in so far as the defendant, the Eastern Band of Cherokee Indians, is concerned."

On the 25th day of January, 1957 (P.A. 28), the Court entered an Order dismissing the action as to the Eastern Band of Cherokee Indians. This holding was affirmed on appeal by the United States Court of Appeals on July 13, 1957.

The allegations of the Complaint would indicate that the business sections of the Cherokee Indian Reservation in Swain County, North Carolina, adjacent to the Great Smoky Mountain National Park, have become a vast commercial enterprise, conducted by the Eastern Band of Cherokee Indians, a North Carolina corporation, and by individual Indians. By signs, posters, literature and other forms of advertisement, the public has been invited to the Reservation to view its exhibits and to purchase its merchandise. Pursuant to the invitation extended, the plaintiffs

visited the Reservation and were traversing the swinging bridge over the beautiful Oconaluftee River, which extended from a point adjacent to the main-travelled highway through the Great Smoky Mountain National Park across the river to a point where the individual defendants operated a restaurant and gift-shop, the bridge being one of the walks and ways on the Reservation where the public was invited to go. The bridge was constructed by the suspension of wire cables which were attached on either side of the river by hooks or eyelets. The weight of the traffic simply caused the eyelets to straighten out, resulting in the collapse of the structure.

In dismissing the action against the Eastern Band of Cherokee Indians, a corporation, the Court below held in effect that this corporation possessed sovereign immunity, and, therefore, could not be sued without the consent of Congress. In determining the question presented for review, the history of the North Carolina Cherokees and their relationship to the United States, and consequent status, become questions of fundamental importance. This history and the status of the North Carolina Cherokees has been covered in detail in the cases of *The Eastern Band of Cherokee Indians vs. the United States*, 117 U.S. 288, 29 L. Ed. 880 (1886) and *United States vs. Wright*, 53 F (2) 300. This history, for ready reference, is briefly summarized in the succeeding paragraphs.

The Cherokee Nation originally was in possession of large areas of land which are now located in North Carolina, Georgia, Tennessee and Alabama. By a series of treaties, culminating in the Treaty of New Echota (1835), the Cherokee Nation gave up its rights to these lands and moved West of the Mississippi. A few scattered individual Cherokees refused to move West, and remained in the mountains of North Carolina. The Treaty of New Echota provided that those Indians who were adverse to

moving West and who were able to take care of themselves, and who were "desirous to become citizens of the states where they resided" might remain in such states, and that they would receive their due portion of the "personal benefits" accruing under the Treaty. By Act of Congress (1868) *15 Stat. 228*, the Commissioner of Indian Affairs took supervisory charge over the North Carolina Indians, and the Government fostered and encouraged them in the development of a civilized life. By 1886 these individual Indians established a loose form of association for social and economic purposes and asserted their status as a part of the Cherokee Nation, and as such, entitled to the proportionate part of funds held by the Government for the Cherokee Nation. In the case of *The Eastern Band of Cherokee Indians vs. the United States*, supra, the Supreme Court rejected this contention, and fixed the status of these Indians as of that date (1886). In that case the Court refused to recognize the Eastern Band of Cherokee Indians as a "separate political organization", and held that they were not "a Nation in whole or in part", and that they were not "the successor of any organization recognized by any treaty or law of the United States".

Subsequent to this decision, and in 1889, the Cherokees sought and secured a charter from the State of North Carolina, incorporating them as a "body politic and corporate" under the style and title of "The Eastern Band of Cherokee Indians", with the right to sue and be sued, and possessing all the rights, franchises, privileges and powers incident and belonging to corporations under the State of North Carolina. By vote of the members of the Band, a charter under the Indian Reorganization Act of 1934 (*48 Stat. 984*) was refused, and today, their political organization functions by virtue of the State charter. The Eastern Band, prior to its incorporation, had purchased the land which is now contained within the Reservation at Cherokee, North Caro-

lina. In 1875 this land was conveyed by the Eastern Band to the Commissioner of Indian Affairs, and later was conveyed back to the Eastern Band of Cherokee Indians, a North Carolina corporation. Subsequently, in 1924, this property was conveyed by the corporation to the United States to be held in trust for the Indians. Thus, the United States has recognized the validity of the North Carolina corporation.

## REASONS FOR GRANTING THE WRIT AND ARGUMENT

**The Circuit Court of Appeals for the Fourth Circuit Has, In This Case, Decided a Federal Question in a Way in Conflict with Applicable Decisions in This Court and Has Also Decided an Important Question of Federal Law Which Has Not Been, But Should Be Settled by This Court.**

In 1886, this Court held that the Eastern Band of Cherokee Indians was not a Nation "in whole or in part". *The Eastern Band of Cherokee Indians vs. the United States*, 117 U.S. 288, 29 L. Ed. 880. In the instant case, the United States Court of Appeals holds that the Eastern Band of Cherokee Indians is a Nation, or Tribe, and is entitled to sovereign immunity.

Subsequent to the decision of this Court in 1886, the Executive Branch of the Government could not have recognized the Eastern Cherokees as an independent tribe or nation, for in 1871, Congress provided that:

> "No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty."

*Congressional Act of March 3, 1871 (25 U.S.C. 71).*

This Court, in the case of *The Eastern Band of Cherokee Indians vs. the United States*, supra, described that Band in the following language:

> "The Cherokees in North Carolina dissolved their connection with their Nation when they refused to accompany the body of it on its removal, and they have had no separate political

organization since. Whatever union they have had among themselves has been merely a social or business one. It was formed in 1868, at the suggestion of an officer of the Indian Office, for the purpose of enabling them to transact business with the Government with greater convenience. Although its articles are drawn in the form of a Constitution for a separate civil government, they have never been recognized as a separate nation by the United States; no treaty has been made with them; they can pass no laws; they are citizens of that state and bound by its laws. As well observed by the Court of Claims, in its exhaustive opinion, they have been in some matters fostered and encouraged by the United States but never recognized as a Nation in whole or in part. Nor is the Band, organized as it now is, the successor of any organization recognized by any treaty or law of the United States."

It was subsequent to the foregoing decision that the Eastern Band of Cherokee Indians recognized that they had no political status, and, consequently, applied to the State of North Carolina for a charter which incorporated them into a "body politic incorporate".

No Act of Congress has endowed the North Carolina Cherokees with any of the attributes of sovereignty, nor has Congress exempted these Indians from tort liability. Congressional Acts relate only to contracts, alienation of property, and social welfare.

Many of the Indian tribes in the United States are entitled to raise the defense of sovereign immunity, but this does not apply, however, to the North Carolina Cherokees. The decisions of this Court, and, indeed, those of this Court which were relied upon and referred to by the Court below (R., 60), invariably recite or refer to the *former sovereign status* of the defendants as

being the basis of their immunity. The North Carolina Cherokees have never enjoyed any *former sovereign status*, and were "never recognized as a nation in whole or in part". The cases cited by the Court below in support of its decision are not applicable. In those cases, each of the tribes of Indians involved had enjoyed sovereign status, and had entered into treaties with the United States. Illustrative of this are the following:

*United States vs. U. S. Fidelity & Guaranty Co.*, 309 U.S. 506 (1940), where this Court said:

> "It is as though the immunity which was theirs as sovereigns passed to the United States for their benefit."

*Thebo vs. Choctaw Tribe of Indians*, 66 F 372 (CCA 8, 1895:

> "It has been the policy of the United States to place and maintain the Choctaw Nation and the other civilized Indian Nations in the Indian territory, so far as relates to suits against them, on the plane of independent states. . . . . The sovereign cannot be sued in its own courts or any other without its consent."

This Court held in 1831 that the *Cherokee Nation* was a sovereign state. *Cherokee Nation vs. State of Georgia*, 30 U.S. 1, 5. Pet. 1 (1831). This same Court in 1886 held that the *Eastern Band of Cherokees* was not a sovereign state, "in whole or in part": *Eastern Band of Cherokee Indians vs. United States*, supra. Only by reversing such holding, could the decision of the Court below be sustained. The opinion below quotes copiously from its decision in the case of *United States vs. Wright*, 53 F (2) 300 (CCA 4, 1931). This case, however, did not hold that the Eastern Band of Cherokee Indians was entitled to sovereign immunity. It held simply that the lands of these Indians which were

held in trust by the United States was not subject to taxation *because while those lands were held by the Government in trust, they became an instrumentality of the Government, which instrumentality could not be taxed.* And then, the idea of sovereign immunity was completely negatived by the Court below, when in the same opinion, it held:

> "So long as it (the land) was held by the Band in its corporate capacity, it was subject to taxation unless exempted by Congress."

None of the other cases cited in the opinion below support the proposition of sovereign immunity. *United States vs. Colvard*, 89 F (2) 312, (CCA 4, 1937), held only that the United States, legal title holder of the Indian land, as trustee, may enjoin trespasses thereon. *United States vs. 7,405.3 Acres of Land in Macon, Clay and Swain Counties, North Carolina*, 97 F (2) 417 (CCA 4, 1938) held that title to such lands may not be established by adverse possession by another. *Blair, etc. vs. McAlhaney*, 123 F (2) 142 (CCA 4, 1941) and *United States vs. Parton*, 132 F (2) 886 (CCA 4, 1943) held that the Commissioner of Indian Affairs cannot be ordered by Court to grant a license to operate a store on the Indian lands.

It is true, as pointed out in the case of *The Eastern Band of Cherokee Indians vs. United States*, supra, that these Indians, "have been in some matters fostered and encouraged by the United States", but the duty of the United States in this respect does not rest upon the commerce clause of the Constitution.

> ". . . . Long continued legislative and executive usage and an unbroken current of judicial decisions have attributed to the United States as a superior and civilized nation the power and the duty of exercising a fostering care and protection of all dependent Indian communities within its borders. . . .

the power must exist in the Federal Government because it never has existed anywhere else. . . . ."
*27 Am. Jur.*, 568, Sec. 42

See also *United States vs. Holliday*, 3 Wall. 407, 18 L. Ed. 182.

This duty to protect Indian communities, however, does not automatically endow them with sovereignty or immunity. The Alaskan Indians who remained in Alaska after the Russian-United States Treaty, ceding that territory, were held not to constitute an independent state or sovereign. *In re Sah Quah*, 31 F 327 (1886). In many respects, the situation of these Alaskan Indians resembles that of the Eastern Band of Cherokee Indians,

No immunity from suit arises by virtue of the fact that these Cherokee Indians are wards of the Government. The individual Indians are, likewise, wards of the Government, but they sue and are sued regularly in all courts, and, in fact, individual Indians are parties-defendant in this suit.

There exists no cogent reason why, just because the Eastern Band of Cherokee Indians are indeed Indians, they should not be liable for their wrongs. Legislation relating to contracts and alienation of property are to protect them against the advantages of a superior race, and from "the artful practices of designing men". However, these reasons could have no application in the situation presented here, for these plaintiffs have in no way taken any unfair advantage of the Indians. We suggest that even should Congress pass an Act attempting to relieve these Indians of tort liability under the laws of North Carolina, such an Act would not have a proper relationship to the purposes for which the Federal Government exercises its guardianship, and would properly be void. In *United States vs. Wright*, (4th Cir.) 53 F (2) 301, the Court said:

"On the first question, therefore, we think there can be no doubt that Congress has the power to legislate for the protection of the Eastern Band of Cherokee Indians and for the regulation of the affairs of the band. It is clear, however, that not every act of Congress with relation to the band would come within the power. *As heretofore stated, the members of the band, by separation from the original tribe, have become subject to the laws of the state of North Carolina; and clearly no act of Congress in their behalf would be valid which interferred with the exercise of the police power of the State. In such a situation, a law to be sustained must have relation to the purpose for which the federal government exercises guardianship and protection over a people subject to the laws of one of the states, i.e., it must have reasonable relation to their economic welfare.*" (Emphasis ours)

The present organization of the Band under the State charter appears to be a municipal corporation, and in the absence of Congressional Act to the contrary, is subject to suit under North Carolina law for negligence in maintaining its walks and ways.

Over three million people each year visit the Great Smoky Mountain National Park and the Reservation of the Eastern Band of Cherokee Indians. It can be anticipated that unfortunate accidents will re-occur. The ultimate Federal question of liability in tort has not been, but should be, finally settled for the protection of the public.

## CONCLUSION

As demonstrated herein, the decision of the Court below in respect to principles relating to immunity from suit is, in several particulars, in direct conflict with the decision of this Court. The tort liability of the Eastern Band of Cherokee Indians, a North

Carolina corporation, has not been, but should be, finally determined. In view of the exposure of persons who, in increasing numbers, are going upon this Reservation, there is need for a definitive statement from this Court with respect to whether or not the corporate defendant enjoys any sovereign immunity.

Respectfully submitted,

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## APPENDIX A

**(Exhibit No. 1)**

**Opinion of the Court of Appeals for the Fourth Circuit**

Before PARKER, Chief Judge, and SOBELOFF and HAYNSWORTH, *Circuit Judges.*

PARKER, Chief Judge:

This is an action to recover damages for personal injuries sustained from the collapse of a swinging bridge over the Oconaluftee River on the Cherokee Indian Reservation in Swain County, North Carolina. The plaintiffs are citizens of Tennessee who were on a visit to the reservation and who were crossing the bridge to reach a tourist attraction operated by Osley Bird Saunooke and his wife, members of the Eastern Band of Cherokee Indians. Saunooke and wife were named as defendants in the action along with the Eastern Band of Cherokee Indians and the United States "in its capacity as a government and also as trustee for and guardian of the Eastern Band of Cherokee Indians and the individual members thereof." The District Judge dismissed the action against the Eastern Band of Cherokee Indians and against the United States as trustee for and guardian of the band and the individual members thereof, but retained the action against the individual defendants and against the United States, other than as trustee and guardian, and allowed the United States additional time within which to plead to the complaint. He signed an order under Rule 54 (b) severing from the action for purposes of appeal the cause of action as to which dismissal was entered, so as to allow immediate appeal from the order of dismissal and the plaintiffs have appealed therefrom.

It is to be noted that the action was not dismissed as to the individual defendants nor as to the United States, which might be liable under the Federal Tort Claims Act, upon a proper showing

of negligence on the part of its employees in the construction or maintenance of the bridge; but the dismissal extended only to the cause of action asserted against the Eastern Band of Cherokee Indians and against the United States as trustee or guardian for them. As recovery is sought against the United States under the Federal Tort Claims Act for negligence of its employees in connection with the bridge, it is clear that the suit against it in its capacity as trustee for or guardian of the Indians could only be for the purpose of notifying it to defend the suit for them pursuant to Rule 17(c) of the Rules of Civil Procedure, or for the purpose of rendering any judgment which might be entered in the cause binding with respect to the property of the Indians which the government held for them as trustee or guardian.

It is well settled that the Eastern Band of Cherokee Indians is an Indian Tribe within the meaning of the Constitution and laws of the United States. In *United States v. Wright* 4 Cir. 53 F. 2d 300 we went carefully into the history of this remnant of the Cherokees of North Carolina and showed how they had acquired the lands upon which they were living and had reacquired their status as an Indian Tribe under the protection of the Government of the United States. We made reference to their recognition as a tribe by Congress in the Act of July 27, 1868, saying:

> "By the purchases of Thomas, therefore, this Eastern Band of Cherokees had acquired the right to the possession of a large boundary of land in North Carolina, and by the North Carolina statute of 1866 they had acquired, with the approval of the government of the United States, permission to remain permanently in that state. Their economic status had thus been practically restored to what it was prior to the Treaty of New Echota; and Congress in the act of July 27, 1868, 15 Stat. 228, recognized this status by providing that

the Secretary of the Interior should cause a new roll or census to be made 'of the North Carolina or Eastern Cherokees,' and that thereafter the Secretary of the Interior should 'cause the Commissioner of Indian Affairs to take the same supervisory charge of the Eastern or North Carolina Cherokees *as of other tribes of Indians*'. (Italics ours)."

We pointed out how the lands of these Indians had been conveyed by the Commissioner of Indian Affairs to the corporation created by the Legislature of North Carolina under a decree which provided that nothing therein should "be construed as interfering with the right of the Commissioner of Indian Affairs from exercising such supervisory charge over the person and property of said band of Indians and the members thereof and the contracts of said Indians as that officer now has by virtue of the Constitution of the United States and the treaties and laws in pursuance thereof." We pointed out also that the deed of the Commissioner of Indian Affairs contained the same proviso and that the title remained in the corporation until conveyed to the United States on July 21, 1925 pursuant to the provisions of the Act of June 4, 1924. With respect to the guardianship exercised over this band of Indians by the United States, we said:

"Not only with respect to the acquisition and preservation of the title to this land, but also in practically every other way imaginable, the government of the United States from 1868 to the present day has continuously guarded and protected the interests of this band of Indians, and has done everything possible to promote their progress and development. It has supervised their contracts and instituted suits for the cancellation of contracts which were thought not advantageous to them. *U.S. v. Boyd* (C.C.) 68 F. 577; Id. (C.C.A.) 83 F. 547. It has appointed agents to guide them in the management of their affairs. It has built schools, including

a large boarding school, and provided teachers for the education of their children. It has provided an experienced farmer to go among them and teach them the arts of agriculture. It has provided a hospital for the care of their sick, and has made provision for the care of their deaf, dumb, blind, and insane. It has provided a physician and a field nurse to go among them and care for the sick in their homes. It has furnished food and clothes for their school children, and has made allowances to members of the tribe to aid in their support. In other words, it has for more than sixty years treated them in all respects as wards of the nation, and has expended in recent years more than $100,000 annually for their support. It appears that for the fiscal year 1930 the appropriation for this purpose was approximately $135,000.

". . . . the life of this band of Indians, from an economic standpoint, both in its relation to the federal government and to the state, has been for more than sixty years practically that of other Indian tribes. Politically they have been subject to the laws of the state, but economically they have been wards of the federal government and cared for as such under the provisions of its laws."

The court expressly answered the argument, now made again, that the Eastern Band of Cherokee Indians had lost their status as an Indian Tribe by reason of their separation from the main body of the Cherokees that had gone to the Indian Territory, saying:

"The fact that the Eastern Band of Cherokee Indians had surrendered the right to their tribal lands, had separated themselves from their tribe, and had become subject to the laws of the state of North Carolina, did not destroy the right

or the duty of guardianship on the part of the federal government. The fact that they constituted a community of these aboriginal people who were wards of the government was sufficient basis for the exercise of the power; and to what extent the power should be exercised was for Congress to decide. Even the conferring of citizenship upon the Indians and allotment of lands to them in severalty does not place them beyond the reach of congressional regulations ~~adopted for their protection. UNITED STATES v. SAN-~~ adopted for their protection. *United States v. Sandoval*, supra; *Tiger v. Western Inv. Co.*, 221 U.S. 286, 31 S. Ct. 578, 55 L. Ed. 738; *Heckman v. U.S.*, 224 U.S. 413, 32 S. Ct. 424, 56 L. Ed. 820; *U.S. v. Nice*, 241 U.S. 591, 36 S. Ct. 696 60 L. Ed. 1192; *Brader v. James*, 246 U.S. 88, 96, 38 S. Ct. 285, 62 L. Ed. 591. And the principle is well settled that whether the protective and regulatory power of Congress shall be extended over an Indian community is a political question with the determination of which the courts have no power to interfere. *United States v. Holliday*, 3 Wall. 407, 419, 18 L. Ed. 182; *Tiger v. Western Inv. Co.*, supra; *United States v. Sandoval*, supra; *Sisseton & Wahpeton Bands of Sioux Indians v. U.S.*, supra.

* * *

"In this case there can be no question but that the Eastern Band of Cherokee Indians is a distinctly Indian community. Congress for more than half a century has recognized it as such, and has extended to it the guardianship and protection of the government. In the opinion of Assistant Attorney General Campbell in 1901 approved by Secretary Hitchcock (copied in the record at pages 117-141) is contained a summary of the acts of Congress passed up to that time for the care and protection of the band, and the Assistant Attorney

General thus summarizes his conclusions with regard thereto: 'From the foregoing necessarily prolix recitals it is manifest that the government has all along exercised a supervisory control over this band of Indians both in matters growing out of the treaties with the Cherokee Nation proper and the relations of the band itself involving the approval and disapproval of deeds and contracts with respect to the acquisition and sale of their lands and the disposal of the timber thereon. Since 1868, under specific legislation, the same supervisory charge has been taken of the Eastern Band of Cherokee Indians of North Carolina as of other tribes of Indians. There is nothing in recent legislation nor in the decrees of the courts to warrant the adoption of a different course or policy in regard to them. On the contrary the courts fully recognize such authority and decline to interfere with its exercise, thus conceding that it exists nowhere else."

In *United States v. Boyd* 4 Cir. 83 F. 547, 555, this court dealt with a suit instituted by the United States to declare void a timber contract entered into by the band. In holding that even in the absence of fraud a contract not approved by the Department of the Interior would not be enforced, Judge Goff, after reciting various acts of Congress showing that the government was exercising the right of guardianship over the affairs of the band, said:

"This shows that the original condition of the Indians in this country — that of pupilage under the government — has not been released, so far as this Eastern Band of Cherokees is concerned. It thus appears that the political departments of the government have recognized these Indians as constituting a tribe, — at least, within the meaning of that word as it is used in the constitution of the United States; and it

> is a rule of the courts, in matters of this kind, to follow the action of the executive and the departments whose duty it is to determine such affairs."

For other decisions of this court holding the Eastern Band of Cherokee Indians to be an Indian tribe within the meaning of the Constitution and Laws of the United States, see *United States v. Coltard* 1 Cir. 89 F. 2d 312; *United States v. 7,405.5 Acres of Land in Macon, Clay and Swain Counties, North Carolina, Et Al.* 1 Cir. 97 F. 2d 117; *Blair, Superintendent of the Cherokee Agency v. McAlhaney* 1 Cir. 123 F. 2d 142; *United States v. Parton* 1 Cir. 132 F. 2d 886.

The rule that a tribe of Indians under the tutelage of the United States is not subject to suit without the consent of Congress is too well settled to admit of argument. *Thebo v. Choctaw Tribe of Indians* 8 Cir. 66 F. 372; *Adams v. Murphy* 8 Cir. 165 F. 304, 308; *Turner v. United States* 248 U.S. 354, 358; *United States v. U.S. Fidelity & Guaranty Co.* 309 U.S. 506. In the case last cited the Supreme Court said:

> The public policy which exempted the dependent as well as the dominant sovereignties from suit without consent continues this immunity even after dissolution of the tribal government. These Indian Nations are exempt from suit without Congressional authorization. It is as though the immunity which was theirs as sovereigns passed to the United States for their benefit, as their tribal properties did.

In *Rollins v. Eastern Band of Cherokee Indians* 87 N.C. 229, the Supreme Court of North Carolina rendered a decision to the same effect, refusing to entertain a suit against this very band of Indians on the ground that they were under the guardianship of the federal government. The court said of the Act of Congress of July 15, 1870, c16 Stat. 362, sec. 11, that, if it did

not confer, it recognized a corporate capacity in them as a collective body or tribe. It said further: "The remnant band of Cherokees remaining in the state, by distinct legislative action, have been placed upon the same footing with other Indian tribes, under the protection and care of the government, and these statutory provisions (i.e. those for the protection of Indians) apply with equal pertinency and force to them as to that portion of the tribe who have emigrated and been located in their western home. . . . It is obvious that the Indian tribes are in a state of pupilage to the general government, and the safeguards of law are placed over them to secure them and their property from the artful practices of designing men, the dictate of an enlightened sense of national duty to the weak and defenseless of a race rapidly diminishing in numbers, and deemed incapable of self-protection."

The arguments offered in support of the right to sue this band of Indians, either directly or through the United States as trustee and guardian, merit but brief answer. It is said that the right to sue the band is given by the act of the Legislature of North Carolina incorporating the band; but it is perfectly clear that an act of a state legislature cannot be allowed to interfere with the guardianship over these people which the United States has assumed, since Congress alone must determine the extent to which the immunities and protection afforded by tribal status are to be withdrawn. See *Tiger v. Western Investment Co.* 221 U.S. 286; *United States v. Nice*, 241 U.S. 591; *Brader v. James* 246 U.S. 88; *United States v. McGowan* 302 U.S. 535, 538; *Board of Commissioners v. Seber* 318 U.S. 705. . .

In the absence of consent by Congress that these wards of the government be sued, it is not permissible to accomplish the same result indirectly by suing the United States as trustee or guardian for them. *Turner v. United States, supra*, 248 U.S. 354,

359. There is nothing in the federal Tort Claims Act which authorizes any such suit. That Act authorizes suit against the government for damages caused by an employee of the government acting within the scope of his office or employment, not a suit against wards of the government nor against the government as their guardian for damages resulting from their acts, and the position of plaintiffs is not helped by reference to the Uniform Trusts Act. G.S. of North Carolina 36-37. Aside from the fact that the Uniform Trusts Act does not purport to render the trustee liable for the torts of the cestui que trust, it is clear, as pointed out above, that only Congress can determine the extent to which the immunities and protection afforded by tribal status are to be withdrawn.

The suit against the Eastern Band of Cherokee Indians and against the government in its capacity as guardian or trustee was properly dismissed; but, as heretofore stated, this will not preclude plaintiffs from proceeding against the individual defendants, nor against the government itself, if they can show damages resulting from any negligent or wrongful act or omission of any employee of the government acting within the scope of his office or employment.

Plaintiffs contend that they are entitled to judgment by default against the United States in its sovereign capacity; but that question is not before us on the appeal from the order of dismissal and is without merit in any event, as the trial judge was acting well within his discretion in extending the time of the United States to file answer until after the questions raised by this appeal should be decided.

Affirmed.

## APPENDIX A

### (Exhibit No. 2)

### Judgment and Order of the United States District Court for The Western District of North Carolina

This cause, coming on to be heard before the undersigned United States District Judge upon the motion of the Defendant, the Eastern Band of Cherokee Indians, to dismiss this action as to said Defendant, and being heard, the Court, after hearing argument of Counsel for the Plaintiffs and the said Defendant, and after considering the Complaint of the Plaintiffs, the motion of the Defendant, and the Affidavits referred to in said motion, being the Affidavits of Glenn L. Emmons, United States Commissioner of Indian Affairs, the Affidavit of W. Barton Greenwood, Assistant Commissioner of the Bureau of Indian Affairs, and the Affidavit of D. Otis Beasley, Administrative Assistant Secretary of the Department of the Interior, makes the following findings of fact and conclusions of law:

### FINDINGS OF FACT

(1) That by this action the Plaintiffs seek recovery of damages from the Defendants for injuries to the Plaintiffs resulting from the collapse on July 5, 1955, of a certain bridge across the Oconaluftee River, located on the Qualla Boundary of the Eastern Band of Cherokee Indians in Swain County, North Carolina. The legal title to said Qualla Boundary upon which said bridge was located was on said date, and still is, vested in the United States in trust for the Eastern Band of Cherokee Indians by virtue of a deed of conveyance executed by the Eastern Band of Cherokee Indians to the United States, which deed bears date July 21, 1925, and was executed by the Indians and accepted by the United States under the provisions of Act of Congress passed on June 4, 1924 (43 STAT. 376).

(2) That prior to 1835 the Cherokee Indian Tribe lived in large areas of what are now the States of Tennessee, North Carolina, South Carolina, Alabama and Georgia. By successive treaties beginning with the Treaty of Hopewell in 1785 (7 STAT. 18) and ending with the Treaty of New Echota in 1835 (7 STAT. 478) the possessory right of the Cherokee Tribe over lands in North Carolina was gradually extinguished and all such land was made subject to grant by North Carolina. By the Treaty of New Echota the Tribe agreed to remove from North Carolina westward beyond the Mississippi in consideration of a payment of money by the United States and a grant of land beyond the Mississippi. A large number of Cherokees were moved as a result of the Treaty of New Echota by the United States Government to new lands West of the Mississippi. However, a number of the North Carolina Cherokees were permitted to remain in North Carolina in accordance with Article 12 of the Treaty of New Echota and others hid in the mountains of Western North Carolina and were not moved. By treaty with the Cherokee Indians in 1846 (9 STAT. 871) the United States recognized certain rights in the Cherokees then residing East of the Mississippi River as follows:

> "Article 10. It is expressly agreed that nothing in the foregoing treaty contained shall be so construed as in any manner to take away or abridge any rights or claims which the Cherokees now residing in states East of the Mississippi River had, or may have, under the Treaty of 1835 and the supplement thereto."

The Congress of the United States more specifically recognized the rights of the Cherokees residing in North Carolina by Act of July 29, 1848 (9 STAT. 264), which made provision for taking a census of the North Carolina Cherokees and the payment of certain per capita payments. In accordance with this Act

the first authentic role of the Eastern Cherokees residing in North Carolina subsequent to the Treaty of 1835 was made and the number entitled to enrollment found to be two thousand one hundred thirty-three. Subsequently, by Act of July 27, 1868 (15 STAT. 228) the Congress of the United States directed the Secretary of the Interior to have a new role of the North Carolina Cherokees prepared and Section 3 of this Act provided as follows:

> "And be it further enacted, that hereafter the Secretary of the Interior shall cause the Commissioner of Indian Affairs to take the same supervisory charge of the Eastern or North Carolina Cherokees as of other tribes of Indians."

Following enactment of this Act the Commissioner of Indian Affairs on November 7, 1868, by letter, advised the Cherokee Indians in North Carolina to organize themselves into a tribal capacity and elect their own officers, and the Eastern Cherokees shortly thereafter on December 9, 1868, at Cheoa, North Carolina, set forth a declaration establishing a simple form of tribal government. Subsequently and on October 13, 1875, at Cheoa Council Ground, the Eastern Band of Cherokee Indians approved a constitution known as the Welch Constitution, which provided for a Tribal Council and the number and qualifications of the members of the Council, a Principal Chief, a Vice Chief, other tribal officials, and the composition of the executive council, and specified that the annual council should be held on the first Monday in October. The Welch Constitution was in operation until the State of North Carolina passed Chapter 211 of the Private Laws of 1889 entitled "An Act incorporating the Eastern Band of Cherokee Indians, and for other purposes." This Act was subsequently amended by Chapter 166 of the Private Laws of 1895, Chapter 207 of the Private Laws of 1899, Chapter 128 of the Private Laws of 1931 and Chapter 39 of the Private Laws of 1933. The Eastern Band of Cherokee Indians has, as provided

in the State Charter, elected a Principal Chief, a Vice Chief and a Tribal Council and these officials have directed the business and affairs of the Eastern Band of Cherokee Indians in accordance with tribal ordinances and resolutions adopted by the Tribal Council and approved by the United States Indian Office. By election held on December 20, 1934, the Eastern Band of Cherokee Indians voted by a vote of 700 affirmative votes to 101 negative votes to accept the provisions of the Indian Reorganization Act of June 18, 1934, (48 STAT. 984). On August 28, 1935, the Eastern Band of Cherokee Indians voted 381 for and 484 against accepting a constitution and by-laws in accordance with Section 16 of that Act.

(3) That subsequent to the Act of July 27, 1868 (15 STAT. 228) the Congress of the United States has enacted many other Statutes relating specifically to the Eastern Band of Cherokee Indians and recognizing their status as an Indian Tribe. As provided in Section 3 of that Act, the Secretary of the Interior has caused the Commissioner of Indian Affairs to take the same supervisory charge of the Eastern Band of Cherokee Indians as of other tribes of Indians. Continuously since the enactment of the Act of July 3, 1868 (15 STAT. 228) until the present time, the Government of the United States, by successive Acts of the Congress of the United States, and by repeated actions of its Executive Branch, acting particularly through the Bureau of Indian Affairs, has recognized the Eastern Band of Cherokee Indians as an Indian Tribe in all respects exactly as other Indian Tribes. Consistently and continuously since that date the legislative and executive branches of the Federal Government have dealt with and exercised supervision over the Eastern Band of Cherokee Indians in the same manner and to the same extent as over other Indian Tribes. The United States Government holds title to their lands and holds their funds in its treasury as trustee for these Indians.

*Appendix A*

The United States Government maintains an Indian Agency at Cherokee, North Carolina, with a Superintendent in charge thereof under the Bureau of Indian Affairs. The Congress has appropriated substantial Federal funds to be available each year to the Cherokee Indian Agency to pay the costs of administration, education of the Indians, forestry, soil conservation, construction and maintenance of roads and buildings and other purposes for the welfare of these Indians. These various programs for the fiscal year 1956 will cost approximately $650,000.00 in Federal funds. Through the Cherokee Indian Agency the United States Bureau of Indian Affairs has dealt with the Tribal Authorities of the Eastern Band of Cherokee Indians and has exercised supervisory control over their affairs in such matters as the management and conservation of their resources, the appointment of tribal attorneys, the safe-guarding of Indian lands, the granting of traders' licenses, the making of tribal membership roles, and other matters affecting the welfare of these Indians. Expenditures from the tribal funds of these Indians which are held in the United States Treasury in trust for their benefit are made only after the Tribal Council has adopted a budget for this purpose, which budget has been approved by the Superintendent of the Cherokee Indian Agency and the Bureau of Indian Affairs, submitted to the Federal Bureau of the Budget, and finally authorized by Act of Congress as part of the general budget of the President of the United States for operation of the Federal Government. By these and many other actions both the Congress of the United States and the Executive Branch of the Federal Government have over a long period of years and continuing to the present time dealt with and recognized the Eastern Band of Cherokee Indians as an Indian Tribe within the meaning of the Constitution and Laws of the United States.

(4) That the Congress of the United States has not passed

any Act or otherwise taken any action giving its consent that this action may be brought against the Eastern Band of Cherokee Indians.

## CONCLUSIONS OF LAW

(1) That the political departments of the Federal Government recognize the Defendant, the Eastern Band of Cherokee Indians, as constituting an Indian Tribe, and it is a rule of the Courts, in matters of this kind, to follow the action of the Congress and the Executive Departments whose duty it is to determine such affairs. Applying this principle, it has now been conclusively established by a long line of decisions of the Circuit Court of Appeals that the Defendant, the Eastern Band of Cherokee Indians, is an Indian Tribe within the meaning of the Federal Constitution and the laws of the United States. *United States vs. Boyd*, 83 F. 547 (C.A. 4th, 1897); *United States vs. Wright*, 53 F. (2d) 301 (C.C.A. 4th, 1931); *United States vs. Colvard*, 89 F (2d) 312 (C.C.A. 4th, 1937); *United States vs. 7,405.3 Acres of Land in Macon, Clay and Swain Counties, North Carolina, Et Al.* 97 F. (2d) 417 (C.C.A. 4th, 1938); *Blair, Superintendent of the Cherokee Indian Agency vs. McAlhenny*, 123 F. (2d) 142 (C.C.A. 4th, 1941); *United States vs. Partin*, 132 F. (2d) 886 (C.C.A. 4th, 1943).

(2) That Chapter 211 of the Private Laws of North Carolina of 1889 entitled "An Act incorporating the Eastern Band of Cherokee Indians, and for other purposes," as subsequently amended by other Acts of the General Assembly of North Carolina, is operative only in so far as it does not conflict with the rights conferred upon the Eastern Band of Cherokee Indians by the Constitution and Laws of the United States and only in so far as it does not interfere with the supervisory control which the Federal Government exercises over this Indian Tribe. Since the

Federal Government has plenary power and control over this Indian Tribe, the State of North Carolina is without power by Act of its Legislature to authorize suit to be brought against the Defendant, the Eastern Band of Cherokee Indians, or in any other manner to interfere with Federal control over its affairs. *United States vs. Boyd*, 83 F. 547 (C.A. 4th, 1897); *United States vs. Wright*, 89 F. (2d) 312 (C.C.A. 4th, 1931).

(3) That the Congress of the United States can alone authorize a suit to be brought against an Indian Tribe and that the Defendant, the Eastern Band of Cherokee Indians, is exempt from suit without such congressional authorization. As was said by the Supreme Court of the United States in the case of *United States vs. United States Fidelity and Guaranty Co.*, 309 U.S. 506, 60 S. Ct. 653, 84 L. Ed. 894 (1940):

> "The public policy which exempted the dependent as well as the dominant sovereignties from suit without consent continues this immunity even after dissolution of the tribal government. These Indian Nations are exempt from suit without Congressional authorization. It is as though the immunity which was theirs as sovereigns passed to the United States for their benefit, as their tribal properties did."

See also *Thebo vs. Choctaw Tribe of Indians*, 66 Fed. Rep. 372 (C.A. 8th, 1895), and *Rollins vs. The Eastern Band of Cherokee Indians*, 87 N.C. 229 (1882).

(4) That since Congress has not given its consent that the Eastern Band of Cherokee Indians may be sued in this action, this action must be dismissed as to such defendant.

IT IS NOW THEREFORE, ORDERED AND AD-

JUDGED that this action be and the same is hereby dismissed as to the Defendant, the Eastern Band of Cherokee Indians.

THIS 25th day of January, 1957.

/s/ WILSON WARLICK
United States District Judge
for the Western District of
North Carolina